

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

| | | |
|----------------------------------|---|------------------------------|
| IN THE MATTER OF THE WAGE CLAIM |) | Case No. 2618-2005 |
| OF RICHARD D. HANSON, |) | |
| |) | |
| Claimant, |) | |
| |) | FINAL AGENCY DECISION |
| vs. |) | |
| |) | |
| ALL RIGHT CLEANING SYSTEM, INC., |) | |
| A MONTANA CORPORATION |) | |
| |) | |
| Respondent. |) | |

* * * * *

I. INTRODUCTION

On June 28, 2005, Richard D. Hanson (Hanson) filed a claim with the Wage and Hour Unit of the Department of Labor and Industry, alleging that All Right Cleaning System (ARCS) owes him \$1,766.50 in unpaid wages. ARCS now appeals a determination of the Wage and Hour Unit which found it owed Hanson \$1,227.63 in unpaid wages and statutory penalty.

On January 13, 2006, the Hearing Officer held a telephone hearing in this matter. Hanson was present. His cousin, Melvin Hanson, appeared as a witness in his behalf. Dean Harbert, owner, represented the employer.

The parties stipulated to the admission into the record of Documents 1 through 82, contained in the Wage and Hour Unit file.

Based upon the evidence presented in this matter, the Hearing Officer makes the following findings of fact, conclusions of law and final order in this matter.

II. ISSUE

Whether ARCS owes wages as alleged in Hanson's complaint and penalties or liquidated damages pursuant to Mont. Code Ann. § 39-3-206.

III. FINDINGS OF FACT

1. ARCS employed Hanson as a Janitor, beginning on March 17, 2005 and ending on June 2, 2005. ARCS agreed to pay him \$7.50 per hour for up to 40 hours per week and \$11.25 for overtime hours. Hanson was assigned to clean the Albertsons Food Store and started

work at 11:00 p.m. Because the extent of his work duties, Hanson rarely finished before 7:00 a.m. ARCS also assigned him to clean the Smith Food Stores in Kalispell and Columbia Falls.

2. ARCS required Hanson to report his wages on a provided form. Hanson kept track of his hours on his own note paper and did not always report his hours. He often worked with another employee and relied upon them to report their hours. ARCS refused to accept Hanson’s hours unless reported on the proper form.

3. Hanson missed 5 work nights due to illness. Melvin Hanson gave him a ride to work every night, except for 3 nights when he was not available.

4. During the indicated weeks, Hanson worked the following hours, earned the following wages and received wage payments from ARCS.

| week ending | regular hours | overtime hours | regular wages | overtime wages | total wages | wages paid |
|-------------|---------------|----------------|---------------|----------------|-------------|------------|
| 03-19-05 | 24.00 | 00.00 | \$180.00 | 00.00 | \$180.00 | 00.00 |
| 03-26-05 | 40.00 | 10.00 | \$300.00 | \$112.50 | \$412.50 | \$225.00 |
| 04-02-05 | 10.00 | 00.00 | \$75.00 | 00.00 | \$75.00 | 00.00 |
| 04-09-05 | 40.00 | 14.00 | \$300.00 | \$157.50 | \$457.50 | 00.00 |
| 04-16-05 | 40.00 | 22.00 | \$300.00 | \$247.50 | \$547.50 | 00.00 |
| 04-23-05 | 35.00 | 00.00 | \$262.50 | 00.00 | \$262.50 | \$510.00 |
| 04-30-05 | 33.00 | 00.00 | \$247.50 | 00.00 | \$247.50 | 00.00 |
| 05-07-05 | 38.00 | 00.00 | \$285.00 | 00.00 | \$285.00 | 00.00 |
| 05-14-05 | 40.00 | 10.00 | \$300.00 | \$112.50 | \$412.50 | \$585.00 |
| 05-21-05 | 14.00 | 00.00 | \$105.00 | 00.00 | \$105.00 | \$597.50 |
| Totals | 314.00 | 56.00 | \$2355.00 | \$630.00 | \$2985.00 | \$1917.50 |

5. The difference between the wages earned by Hanson and the wages paid by ARCS is the difference between and \$1,917.50, which is \$1,067.50. ARCS also owes a penalty of \$1,050.50 on the unpaid regular wages and a penalty of \$123.75 on the unpaid overtime wages. The total penalty due Hanson is \$1,174.25.¹

¹ **The reasoning and math involved in deriving the penalties appear in the “Discussion,” *infra*.**

IV. DISCUSSION²

ARCS owes wages and penalties.

UNPAID WAGES

Mont. Code Ann. § 39-3-201(6) defines wages to include any money to be paid to an employee. Montana law requires that employers pay employees wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204, and in no event more than 10 days following the separation from employment. Mont. Code Ann. § 39-3-205. Mont. Code Ann. § 39-3-204(3) indicates that an employer may not withhold wages beyond the next ensuing pay period when the employee timesheets are not timely submitted.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. An employee can meet this burden by producing evidence that shows the extent and the amount of work "as a matter of just and reasonable inference." *Garsjo* at 189, 562 P.2d at 476-77, citing *Anderson*, 328 U.S. at 687, and *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497.

In the absence of any wage information from ARCS, Hanson's wage information must be considered accurate. It would have been the employer's source of information in the first instance.

Hanson worked a total of 314.00 regular hours and 56 overtime hours. The total regular wages earned amount to \$2,355.00. The total overtime wages he earned amount to \$630.00. The total wages earned amount to \$2,985.00. The total wages paid are less than that amount by \$1,067.50.

Therefore, ARCS owes Hanson \$1,067.50 in unpaid wages.

PENALTY

Mont. Code Ann. § 39-3-206(1) provides that, "A penalty must also be assessed against an employer who fails to pay an employee as provided for in this part and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid." Previous violation of similar wage and hour statutes within three years prior to the date of filing the current wage claim, justify imposition of the maximum 110% penalty. Admin. R. Mont. 24.16.7556(1)(c). The department has found ARCS engaged in a previous violation of similar wage and hour statutes by failing to pay wages when due. *Scott vs ARCS* (12/15/2005), Case No. 2643-2005.

² **Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.**

For unpaid overtime wages, the maximum 110% penalty applies unless both no special circumstances under Admin. R. Mont. 24.16.7556(1) apply and the employer pays the wages and 55% penalty determined by the department³ to be due, by the date set in the redetermination. Admin. R. Mont. 24.16.7561(1). Special circumstances apply. The 110% penalty applies to the overtime wages unpaid.

For unpaid regular wages (above minimum wage), the 55% penalty applies unless both no special circumstances under Admin. R. Mont. 24.16.7556(1) apply and the employer pays the wages and 15% penalty determined by the department to be due, by the date set in the redetermination. Admin. R. Mont. 24.16.7566(1). Special circumstances are involved. The 110% penalty applies here as well.

ARCS made four partial payments to Hanson. Those payments apply to “the obligation earliest in date of maturity.” Mont. Code Ann. § 28-1-1106(3).⁴ The table below identifies how ARCS’ payments are applied to the wages owing to Hanson. In each case the payments were applied to the regular or overtime wages earned on the earliest date.⁵

| | | Regular Wages | Overtime Wages |
|---------------------------------|--------|---------------|----------------|
| Wages owed on 04/15/05 | | \$855.00 | 270.00 |
| Payment 4/15/05 | 225.00 | <u>225.00</u> | <u>0.00</u> |
| Balance | | 630.00 | 270.00 |
| Wages earned 4/15/05 to 4/25/05 | | 562.50 | 247.50 |
| Subtotal | | 1,192.50 | 517.50 |
| Payment 4/25/05 | 510.00 | <u>397.50</u> | <u>112.50</u> |
| Balance | | 795.00 | 405.00 |
| Wages earned 4/25/05 to 5/10/05 | | 532.50 | 0.00 |
| Subtotal | | 1,327.50 | 405.00 |
| Payment 5/10/05 | 585.00 | <u>427.50</u> | <u>157.50</u> |
| Balance | | 900.00 | 247.50 |
| Wages earned 5/10/05 to 7/27/05 | | 405.00 | 112.50 |

³ The reference to “determined by” is to administrative determinations or redeterminations issued before the case proceeded to contested case hearing. The department includes in each determination and redetermination a notice of the date by which the payment must be made, and the increased penalty thereafter.

⁴ Section 28-1-1106(3) provides that the payments go first to interest and then to principal, but neither of those are applicable in this case.

⁵ Admin. R. Mont. 24.16.7569(1) requires that penalty calculations for mixed claims be made by application of the applicable penalty rule to each component of the claim determined to be valid. Thus, although the same penalty percentage applies to each component, the table separating out the amounts due in each component may be necessary and is certainly appropriate.

| | | | |
|-------------------------|--------|---------------|---------------|
| Subtotal | | 1,305.00 | 360.00 |
| Payment 7/27/05 | 597.50 | <u>350.00</u> | <u>247.50</u> |
| Balance currently owing | | 955.00 | 112.50 |

110% of \$955.00 is \$1,050.50 and 110% of \$112.50 is \$1,23.75. The total penalty due Hanson is \$1,174.25.

V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 *et seq.* *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. ARCS owes Hanson \$1,067.50 for unpaid wages due to him. Mont. Code Ann. § 39-3-204.

3. ARCS owes Hanson \$1,174.25 for statutory penalties on the unpaid wages. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7556(1)(c), 24.16.7561(1)(a), 24.16.7566(1) and 24.16.7569.

VI. ORDER

Dean Harbert, d/b/a All Right Cleaning System is hereby ORDERED to tender a cashier's check or money order in the amount of \$2,241.75, representing \$1,067.50 in unpaid wages and \$1,174.25 in penalty, payable to Richard D. Hanson, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. ARCS may withhold appropriate deductions for income taxes and social security on the wage portion but not the penalty portion.

DATED this 16th day of February, 2006.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID H. FRAZIER
David H. Frazier
Hearing Officer

HANSON FAD DFP